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CHARLES ELMORE CROPLEY
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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1943.

No. 358.

COSGROVE-MEEHAN COAL CORPORATION, COSGROVE & COMPANY, INC., COSGROVE-MEEHAN COAL COMPANY OF PENNSYLVANIA, and LENOX COAL COMPANY,

Petitioners,

vs.

MAURICE P. ANGLAND,

Respondent.

RESPONDENT'S BRIEF CONTRA PETITION FOR WRIT OF CERTIORARI.

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RESPONDENT'S BRIEF CONTRA PETITION FOR WRIT OF CERTIORARI.

COUNTER-STATEMENT OF FACTS.

Subject to the following exceptions, the statement of facts contained in the petition is correct:

(a) On page 2, line 13, it is incorrect to state "respondent as a member of the committee entered into an agreement". The record does not show that his agreement had anything to do with his membership on a Bondholders' Committee. On the contrary, the debtor corporation employed him individually to undertake certain salvage work, as stated in the second paragraph of the opinion of the Circuit Court of Appeals, to which finding no exception has been taken.

(b) On page 3, line 11, the petitioner correctly states that the District Court fixed November 1, 1937 as a date before which creditors' claims should be filed. However, petitioner neglects to state that this date was extended from time to time to May 29, 1942, (No. 108). By the same decree, in paragraph 11, the Court reserved jurisdiction "to make from time to time such further orders as to it shall be deemed proper, amplifying, extending, limiting, or otherwise modifying this order".

(c) It is misleading to state on page 5, line 12, of the petition that "no appeal was taken from said order". Respondent took a timely appeal from the District Court's action in disallowing his claim. That appeal resulted in the reversal which is the subject matter of this petition. Said appeal may not have been worded in the exact lan-

guage of Section 222 of the Bankruptcy Act, but its import is clear.

In addition to the facts stated in the petition, respondent believes the following facts are pertinent:

(a) In the District Court proceedings, petitioner raised no question of any alleged delay by respondent or of any procedural errors.

(b) The sum claimed by respondent, $3,500., is infinitesimal in comparison with the amount involved in the reorganization.

ARGUMENT.

The decision of the Circuit Court of Appeals was not of the type ordinarily reviewed by your Honorable Court for the following reasons:

I. THE ORDER OF THE CIRCUIT COURT OF APPEALS WAS INTERLOCUTORY.

That the order of the Circuit Court of Appeals is interlocutory is so patent as to require no discussion.

II. THERE ARE NO CONFLICTING DECISIONS IN OTHER CIRCUITS.

Every reported decision is in conformity with the order now questioned. All of them hold that discretion to modify a plan rests with the District Court as provided by Section 222 of the Bankruptcy Act.

III. PETITIONER'S OBJECTION IS TO FORM ONLY.

The only real complaint deducible from the petition and brief is that the claim filed by the respondent, Angland, (apparently informally prepared by respondent him-

self and prior to retention of present counsel) was inartistic in that it contained no prayer couched in the language of Section 222 of the Bankruptcy Act. The nature of respondent's demands was obvious. No objection to form was interposed in the District Court. Hence, the failure to artfully plead is hardly a ground for certiorari to the Circuit Court of Appeals which recognized the equities of the case and found that mere errors of form do not absolutely foreclose a litigant's equitable right to a hearing on the merits.

IV. PETITIONER'S OBJECTION SHOULD HAVE BEEN MADE IN THE DISTRICT COURT.

Respondent's claim for compensation for services in salvaging the Illinois properties was filed on June 15, 1942, or seventeen days after the permissive period which ended on May 29, 1942. However, this was two days before the deadline of June 17, 1942 fixed by the Court in its decree of June 6, 1942. It is not likely that the respondent knew the fine line of distinction between the type of claim which was to be filed by May 29, 1942, and the type that petitioner believes could be filed up until June 17, 1942. In any event, petitioner was represented by competent counsel who made no effort to have the District Court quash the claim on the ground of laches. All parties in interest, including the present petitioner, the Securities and Exchange Commission, and other creditors, treated the claim as having been filed in time and the District Court proceeded to take testimony without questioning the date when the petition was filed. Where delay was apparently waived by all parties, it has been held that the contention will not be considered by the Supreme Court. LYNCH vs. U. S., 292 U. S. 571, 587; 54 Supreme Ct. Reporter 840, 847.

V. THE ACTION OF THE CIRCUIT COURT OF APPEALS WAS IN CONFORMITY WITH THE ACT OF CONGRESS.

The order complained of does not finally decide that respondent will receive the amount of his claim, but merely directs proceedings in conformity with Section 222 of the Bankruptcy Act. That Section authorizes the District Court, in its discretion, to modify a plan of reorganization after confirmation.

> "Sec. 222.—A plan may be altered or modified, with the approval of the judge, after its submission for acceptance and before or after its confirmation if, in the opinion of the judge, the alteration or modification does not materially and adversely affect the interests of creditors or stockholders. If the judge finds that the proposed alteration or modification, filed with his approval, does materially and adversely affect the interests of creditors or stockholders, he shall fix a hearing for the consideration, and a subsequent time for the acceptance or rejection, of such alteration or modification. The requirements in regard to notice of hearing, to submission to the Securities and Exchange Commission, to acceptance, to filing and hearing of objections to confirmation and to the confirmation, as prescribed in article VII of this chapter in regard to the plan proposed to be altered or modified, shall be complied with."

This unambiguous language of Congress was recognized by the Circuit Court of Appeals and was given effect, yet the present petitioner would have the Circuit Court of Appeals reversed.

VI. EVEN IF THERE WAS AN UNWAIVED PROCEDURAL DEFECT, SUCH DEFECT WAS HARMLESS.

Filing the claim seventeen days sooner, if that was requisite, would have aided no one. The same questions would be before the Court regardless of filing date. At the moment when the respondent's claim was filed, and throughout the time it was being considered by the District Court, no one could tell what cash sum would be paid to the creditors of the reorganized corporation or how much cash would be turned over to the reorganized corporation, inasmuch as the Court had under consideration claims of other creditors and the usual claims of counsel, committees, accountants, and trustees. Respondent's claim was considered simultaneously with these other claims so that any trivial delay in filing this claim did no harm to the ultimate plan of reorganization. It is not as though this claim had arisen after all others had been adjudicated. The real delay arises from the commission by the District Court of reversible error, and not from any omission by the respondent.

Furthermore Congress, the final arbiter of policy, provided in Section 222, that in equitable cases appealing to the discretion of the District Court, a plan might be modified even after its confirmation. Hence the action of the Circuit Court of Appeals attained an equitable result, complied with the intent of Congress, and preserved to the debtor the full right and privilege of raising all manner of objections in the District Court.

VII. THE ARGUMENTS IN PETITIONER'S BRIEF ARE WITHOUT MERIT.

The petitioner's brief, at page 9, line 6, erroneously states that the respondent "filed no claim as a creditor". Whether or not respondent's claim was artistically drafted, no one could doubt that he was claiming to be compen-

sated for services rendered the debtor corporation before it filed its petition under Section 77B.

On page 10 of the petitioner's brief, it lists seven alleged errors of the Circuit Court of Appeals. Replies to these allegations will be presented seriatim:

1. The bar order of November 1, 1937 was, by its own terms, subject to amendment "on order for cause shown", and was actually extended to May 29, 1942 and thereafter there was an extension to June 17, 1942, the language of which may or may not be broad enough to include the respondent's claim. That is one of the matters that may properly be argued in the District Court under the decision of the Circuit Court of Appeals.

2. To say that the District Court's order of June 6, 1942 directing distribution prevented any further action by this respondent, would be to say that a District Court, by the use of apt language, can thereby block any appeal from its decrees. The proposition answers itself.

3. and 4. Any effort by the District Court to bar creditors' claims is always subject to a petition under Section 222 of the Bankruptcy Act, even after a plan has been confirmed.

If the District Court could terminate all litigation by decreeing that it has "divested itself of all jurisdiction", there would be no excuse for the existence of Appellate Courts.

5. This argument has heretofore been answered. The respondent's objectives contained in his claim filed June 15, 1942 were apparent to everyone, so that the petitioner's real complaint deals with form, not substance.

6. and 7. Section 222 does not set any time limit on the efforts of creditors to obtain what they consider to be justice, but leaves it to the discretion of the District Court,

which is exactly what is accomplished by the decree of the Circuit Court of Appeals in the instant case.

Later on page 10, the petitioner states that the allowance of respondent's claim would materially affect the rights of other creditors. A comparison of the amount of the respondent's claim with the amount of assets available for creditors indicates that an allowance of his claim in full would not materially affect the rights of other creditors. Its effect would be infinitesimal. However, in any reorganization, the precise amount payable to other creditors must necessarily remain indefinite so long as any claims are pending on appeal as in the instant case.

VIII. CONCLUSION.

For the above seven reasons, the complaint concerning the interlocutory decree is trivial throughout, if not frivolous, and is not such as to warrant granting the prayer of the petition and it should therefore be denied.

Respectfully submitted,

McDevitt, Philips and Watters,
By Vincent P. McDevitt,
Attorneys for Respondent.